

### **REMARKS**

Claims 1, 6–9, 25, 26, 29, and 33 have been amended. Claims 2, 3, 5 and 10–12 have been canceled. Claims 19–24 have previously been canceled. No claims have been added. Claims 1, 4, 6–9, 13–18, and 25–33 remain in the application. Applicants request reconsideration of the application as amended and in light of the remarks set forth below.

A Terminal Disclaimer is submitted herewith.

#### **Summary of the Amendments**

Claims 2, 3, 5, and 10–12 have been canceled.

Claims 1, 25, 26, and 29 have been amended to correct deficiencies under 35 U.S.C. § 112.

Claims 6–9 have been amended to change dependency from Claim 5, now canceled, to Claim 1.

Claim 33 has been amended to change dependency from Claim 30 to Claim 26.

#### **Same-Invention Type Double Patenting**

In the event Claim 1 is determined to be allowable, Claims 1 and 5 of the present application are rejected over one another as constituting “same invention type” double patenting. This rejection is moot in view of the cancellation of Claim 5.

The Examiner has rejected Claims 2, 3, and 10–12 as constituting “same invention type” double patenting over Claims 1, 3, and 12–14 of U.S. Patent No. 6,651,504. These rejections are moot in view of the cancellation of Claims 2, 3, and 10–12.

The Examiner has rejected Claims 26, 27, and 28 as constituting same invention type double patenting over Claims 35, 36, and 37, respectively, of U.S. Patent No. 6,651,504. This rejection is respectfully traversed. Two claims do not constitute same-invention type double patenting if it is possible to infringe one of the claims without infringing the other. Claims 35–37 of the '504 patent recite the step of:

“exposing said microstructures to said at least one form of energy other than acoustic energy so as to cause said first and second layers to respond differently physically, creating physical stresses within said microstructures that change the resonant acoustic frequency of at least one of said microstructures from its said natural resonant acoustic frequency to a resonant acoustic frequency falling within a predetermined acoustic frequency range.” (emphasis supplied.)

Claims 26–28 of the present application do not require this step. To the contrary, Claims 26–28 recite the step of “exposing said microstructure array to acoustic energy.” Thus a method which includes the step of exposing a microstructure to acoustic energy could potentially infringe Claims 26–28 of the present application but could not infringe Claims 35–37 of the '504 patent. Similarly, a method which includes the step of exposing a microstructure to a form of energy other than acoustic energy could potentially infringe Claims 35–37 of the '504 patent but could not infringe Claims 26–28 of the present application. The rejection of Claims 26–28 of the present application for same-invention type double patenting is therefore improper and should be withdrawn.

### **Obviousness-Type Double Patenting**

The Examiner has rejected Claims 1, 5, 6, 7, 8, 9, 14, 15, 16, 17, and 18 under the judicially created doctrine of obviousness-type double patenting over Claims 1, 1, 4, 5, 6, 7,

9, 19, 20, 21, and 22 of U.S. Patent No. 6,651,504. These rejections are moot in view of the Terminal Disclaimer filed herewith.

The foregoing is believed to be fully responsive to the Office Action dated September 8, 2004. For the reasons set forth above, the present application is believed to be in condition for examination. Consideration of the application is requested, and allowance of the claims at an early date is courteously solicited.

Respectfully submitted:

A handwritten signature in cursive script, appearing to read "Larry A. Roberts", is written over a horizontal line.

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